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To: Microsoft ATR
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Subject: Microsoft Settlement

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I am offering my comments on the Proposed Final Judgment (PFJ) that was submitted by the United States in Civil Action No. 98-1232. I am also sending you these comments via USPS.

I am encouraging the Court to not accept this settlement for these reasons:

1. The settlement is ineffective;
2. The settlement does not serve the public interest;

I encourage the Court to determine an effective remedy, one that (1) ends the unlawful conduct; (2) avoids a recurrence of the violation and others like it; and (3) undoes the anticompetitive consequences of that unlawful conduct.

Effect of Proposed Remedies

The PFJ is ineffective. It does not restore "competitive conditions in the personal computer operating system market" as the U.S. claims in its Competitive Impact Statement (CIS). In fact, the PFJ does nothing toward that end.

As the U.S. noted in its complaint, "PC manufacturers (often referred to as Original Equipment Manufacturers, or "OEMs") have no commercially reasonable alternative to Microsoft operating systems for the PCs that they distribute." The PFJ does nothing to alter that. Instead, it offers a series of restrictions and prohibitions aimed at opening the market for 'middleware.' It offers nothing to restore a competitive market for operating systems for personal computers.

The PFJ does not "obtain prompt, effective and certain relief for consumers." On the contrary; it's effect will be to leave consumers with no viable choice for personal computer operating systems, other than different versions of Windows, or for browsers, other than different versions of Internet Explorer. Consumers will not reap the benefits of competition among operating systems or browsers, as they have the benefits of competition among OEMs.

In the CIS, the U.S. claims that the PFJ ensures that "consumers will be able to choose to use" non-Microsoft products like Internet browsers. That assumes that such competing products will come to market, but this is unlikely given that Internet Explorer is given away at no cost. As Jon DeVaan, a Senior Vice President of Microsoft, would testify (see Microsoft's offer of proof in opposition to the entry of the government's proposed final judgment): "No sensible company devotes large resources to projects from which it sees no potential return on its investment." The PFJ does nothing to open the market for Internet browsers or other applications, and so it does nothing to give consumers more choice.

In the CIS, the U.S. says the PFJ "forbids Microsoft from stopping OEMs from offering dual-boot systems." Yet the Court has determined that there exists an 'applications barrier' to entry to the market for personal computer operating systems. The PFJ does nothing to remove that barrier.

The District Court concluded that Microsoft violated the Sherman Act, and the Court of Appeals upheld the ruling, determining that Microsoft's "commingling of browser and operating system code constitute exclusionary conduct, in violation of s 2," of the Sherman Act. Yet the PFJ does not address the issue of commingling and leaves Microsoft free to integrate whatever it wishes with Windows, to continue to use its operating system monopoly to extend its reach into new, emerging markets.

The PFJ requires Microsoft to disclose to "ISVs, IHVs, IAPs, ICPs, and OEMs" the APIs used by Microsoft Middleware to interoperate with Windows. The provision requires the disclosure to occur in a "Timely Manner." But "Timely" means only after Microsoft has sent any new version of Windows to at least 150,000 beta testers. The result is that if Microsoft distributes a new version of Windows to

149,999 beta testers, they don't need to disclose the APIs to anyone.

The PFJ contains a provision that if Microsoft engages in "willful and systemic violations of the agreement," then the "requirements and prohibitions" in the PFJ may be extended for two years. What the U.S. is basically saying is this: "if the agreement proves ineffective, our plan is to extend it!"

Finally, things have changed since the U.S. filed its complaint. Microsoft's dominance in the market has continued to grow. It's share of the market for operating systems, browsers, and common applications like word processors, spreadsheets, and e-mail software has increased. And Microsoft is moving on, leveraging its monopoly for operating systems to extend its control of the market with its .NET initiative.

The .NET initiative is Microsoft's program to offer a new development platform, one that sits above the operating system. As Steve Ballmer, CEO of Microsoft, notes, this initiative is "the pillar on which we are building the next version of Microsoft." When the initiative was announced, Ballmer commented: "Starting this year, everything we do will revolve around Microsoft .NET." Having conquered the market for personal computer operating systems, Microsoft is poised to conquer new, emerging markets.

In the CIS, the U.S. says appropriate injunctive relief in an antitrust case should: (1) end the unlawful conduct; (2) avoid a recurrence of the violation and others like it; and (3) undo the anticompetitive consequences of the unlawful conduct. The PFJ achieves none of these objectives. Microsoft's unlawful conduct in the browser market is history, the PFJ does nothing to reopen that market, and it leaves Microsoft free to continue to violate the Sherman Act. And Microsoft's leaders have suggested that that is precisely what they plan to do.

As the U.S. stated in its complaint, "Microsoft has made clear that, unless restrained, it will continue to misuse its operating system monopoly to artificially exclude browser competition and deprive customers of a free choice between browsers," and "Microsoft's conduct with respect to browsers is a prominent and immediate example of the pattern of anticompetitive practices undertaken by Microsoft with the purpose and effect of maintaining its PC operating system monopoly and extending that monopoly to other related markets."

Microsoft's leaders continue to give us reason for concern. At the start of the trial, Steve Ballmer stated in an e-mail message sent to Microsoft employees: "Microsoft's business practices [are] entirely consistent with the way other companies throughout our industry compete." After the Court of Appeals upheld the District Court's finding that Microsoft violated the Sherman Act, Steve Ballmer made these statements:

"I do not think we broke the law in any way, shape, or form. I feel deeply that we behaved in every instance with super integrity."

"We were born a competitor, and we'll continue to compete as we have in the past: vigorously and responsibly."

These statements from the company's CEO do not portend a change in the way Microsoft conducts business.

Comments made by the leaders of Microsoft after the court determined it broke the law illustrate what many informed commentators have noted: "Microsoft just doesn't get it." While we can expect Microsoft to follow the restrictions in the PFJ, we cannot expect it to live up to the spirit of it. And why not? Thomas Friedman, a New York Times columnist put it well in a column he wrote after the District Court ordered a breakup of the company: "Microsoft isn't a threat because it's big. GE is big, Intel is big, Cisco is big. Microsoft is a threat because it is big and deaf to some of the bedrock values of the American system."

The PFJ is ineffective. It does not "eliminate Microsoft's illegal practices, prevent recurrence of the same or similar practices, and restore the competitive threat that (other software) products posed prior to Microsoft's unlawful undertakings" as the U.S. claims.

Rather, it cements Microsoft's position as the sole supplier of personal computer operating systems for the Plaintiffs. It allows Microsoft to continue to dump products on the market in order to maintain market dominance. It allows Microsoft to continue to tie its applications to its operating systems, effectively closing the market to would-be competitors. And it allows Microsoft to build upon its monopoly position to establish market reliance on its next-generation development platform (.NET).

The Public Interest

It is in the public interest for the U.S. to enforce antitrust law; it is not in the public interest for the Court to accept the PFJ. That's because the PFJ does not address the central issue in this matter: Microsoft's monopoly position, and its abuse thereof, in the market for operating systems for personal computers. The public has benefited from competition among PC manufacturers. We've benefited from lower prices, increased functionality, and those innovations that naturally occur when firms compete fairly in a dynamic and open market.
If the PFJ is entered as is, then Microsoft is left with its monopoly. And that means no increased competition for operating systems despite the U.S. claim in the CIS that the PFJ would restore "competitive conditions in the personal computer operating system market."

The U.S. offers no justification for its claim of increased competition for operating systems: none at all. While the PFJ might enhance competition for middleware, it leaves Microsoft in the same monopoly position it was in at the beginning of this action. In fact, since 1990, when the FTC first investigated Microsoft for antitrust, the company's position has only gotten stronger.

The lack of any effective corrective action in the PFJ lets others know that they can get away with similar tactics, that it will take so long for antitrust complaints to be resolved that they don't even matter. The courts are seen as so slow to act that - in a rapidly changing and advancing market - they can be ignored, and that is definitely not in the public interest.

The public interest would be better served by some remedy that ensures that Microsoft won't be back in court, yet again, for antitrust violations. But that is precisely what we can expect given that Microsoft's leaders have stated that they did nothing wrong, that they operated within the law and always have, that they plan on conducting their business as they have in the past, even after the Court of Appeals upheld the District Court's determination that Microsoft employed "anticompetitive means to maintain a monopoly in the operating system market."

The public interest is served by "the Government defining the contours of antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not." Entry of the PFJ works against that. It says, in effect, that if a company has the resources, then it can violate antitrust law. It can raise all sorts of ridiculous arguments to support its violations. It can use obfuscation to avoid answering questions. It can present the court with bogus exhibits that are not what they are claimed to be. It can protest that an antitrust action is simply a means for the U.S. to help the company's competitors, or that the U.S. doesn't know enough about computers or the computer industry to enforce antitrust laws there. The company can buy so much time that the courts and, hence, the laws become ineffective: by the time the courts act, the company has achieved its objectives, and after the courts act, the company keeps its ill-gotten gains. How is that in the public interest?

An Effective Remedy

I encourage the Court to accept nothing less than an effective remedy, one that serves the public interest, that restores competition in the market for personal computer operating systems and applications, and which discourages Microsoft from continuing to function with limited regard for antitrust law.

But this is problematic. The new administration seems to have little interest in pursuing this matter, even though it is charged with enforcing the law and the Court has determined that Microsoft broke the law.

One effective way to open the market could be done by executive order, rather than court order. If the Plaintiffs can require that all their personal computers run Microsoft Windows, then they can just as well require that all their computers run some other operating system, such as UNIX. And there are good arguments in favor of such a change.

Just about every personal computer on just about every desk in just about every government office is equipped with Microsoft Office and Internet Explorer. That application suite includes the most common applications, comprising something like 95% of the applications that 95% of computer users use 95% of the time. That same application suite is available (from Microsoft) for the Macintosh operating system, which is a UNIX-based operating system.

So, if the Plaintiffs adopted a program to use UNIX instead of Windows with their personal computers, the 'applications barrier' would be fairly low. (The 'applications barrier' is a fallacy; Windows isn't more popular than Macintosh because there are so many more applications avaiable for Windows; the reason there are so many more applications for Windows is because Windows is more popular, the Plaintiffs and Corporate America long ago having decided that desktop computers must be IBM compatible.)

Of course, the Plaintiffs also make use of specialized applications. Public agencies of all sorts use specialized applications to manage more and more of their operations; a wide variety of government workers use specialized applications on a regular basis. So, there is a real barrier to adopting an operating system other than Windows: specialized applications that were written for Windows need to be rewritten for UNIX. But there is also an opportunity to eliminate that barrier now.

With its .NET initiative, Microsoft claims it is reinventing its business. Steve Ballmer claims that as .NET versions of its products are released, they will make non-.NET versions of products obsolete in four to six years. And that means that the Plaintiffs, unless they intend to use obsolete products in the future, have these two choices: either they can remain dependent on Microsoft and adopt .NET, or they can start to become independent now; they can switch from Windows to UNIX.

While the DOJ claims (without support) that the PFJ is good for the economy, what would be a boost for the economy is for the Plaintiffs to adopt UNIX. The plaintiffs are a sizeable market for software developers. If the Plaintiffs adopt UNIX, ISVs will develop software for UNIX. And, in a marketplace not controlled by Microsoft, one in which market forces are allowed to operate freely, we'll have open competition, and the benefits of it.

And we won't have to worry about a single firm having sole control of an important component of our modern economy. In two decades, the personal computer has gone from being as popular as ham radio, to being an essential tool, and fundamental to our way of life. We could not enjoy our modern way of life were it not for the development of the personal computer and the software that makes it so useful in so many ways.

The public isn't served when there is only one source of oil, or one bank. or one TV station. And the public is not served by having just one supplier of the most basic software for personal computers. The public is served by free and open competition, and the Plaintiffs have a responsibility to enforce the laws that apply.

I don't think the settlement contained in PFJ is good for the public or the economy. I would like to see the Court require a settlement that accomplishes what the U.S. claims this settlement accomplishes.

Sincerely,

Mister Thorne